APR 28 2000

(3)

No. 99-1592

IN THE

SUPREME COURT OF THE UNITED STATES

EVANDRO S. SANTINI, *et al.*,

Petitioners,

v.

CONNECTICUT HAZARDOUS WASTE MANAGEMENT SERVICE,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF CONNECTICUT

MOTION FOR LEAVE TO FILE AMICUS CURIAE BRIEF AND BRIEF OF THE NATIONAL ASSOCIATION OF HOME BUILDERS AS AMICUS CURIAE IN SUPPORT OF PETITIONER

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MOTION TO FILE AMICUS CURIAE BRIEF IN SUPPORT OF PETITIONER

The National Association of Home Builders ("NAHB") has received the written consent of the petitioner to submit this *amicus curiae* brief.[1] The letter of consent has been filed with the Clerk of this Court. Respondents have declined consent.

The NAHB respectfully moves this Court for leave to file its *amicus curiae* brief in support of petitioner because it wishes to bring to the Court's attention a disturbing trend exemplified by the petitioner's case – the failure by state courts to follow this Court's lead in properly analyzing regulatory takings cases and a failure by these courts to take into any consideration a landowner's distinct investment backed expectations before reaching a decision on a takings claim. In fact, this case represents what can be categorized as the extreme end of this trend, with a court effectively writing out of existence the entire concept of a regulatory taking.

The NAHB represents over 200,000 builder and associate members throughout the United States. Its members include not only people and firms that construct and supply single family homes, but also apartment, condominium, commercial and industrial

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[1] Pursuant to Rule 37.6 of this Court, amicus states that its counsel authored this brief and amicus paid for it. This brief was not written in whole or part by counsel for a party, and no one other than amicus made a monetary contribution to its preparation.

builders, as well as land developers and remodelers. It is the voice of the American shelter industry.

The NAHB has appeared before this Court as an *amicus curiae* or as "of counsel on behalf of the property owner in prior takings cases involving land use regulation. These include *Agins v. City of Tiburon*, 447 U.S. 255 (1980); *San Diego Gas and Electric Co. v. City of San Diego*, 450 U.S. 621 (1981);[2] *Williamson County Regional Planning Commission v. Hamilton Bank*, 473 U.S. 172 (1985); *MacDonald, Sommer & Frates v. Yolo County*, 477 U.S. 340 (1986); *First English Evangelical Lutheran Church of Glendale v. Los Angeles County*, 482 U.S. 304 (1987); *Nollan v. California Coastal Commission*, 483 U.S. 825 (1987);[3] *Pennel v. City of San Jose*, 485 U.S. 1 (1988); *Lucas v. South Carolina Coastal Commission*, 505 U.S. 1003 (1992); *Dolan v. City of Tigard*, 512 U.S. 374 (1994); *Suitun v. Tahoe Regional Planning Agency*, 520 U.S. 725 (1997); and *City of Monterey v. Del Monte Dunes at Montery*, 526 U.S. 687 (1999).

Christopher Senior

[2] Justice Brennan's dissent cited approvingly the NAHB brief. 450 U.S. at 643 n.6.

[3] The Court opinion cited approvingly the NAHB brief. 483 U.S. at 840.

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SUMMARY OF ARGUMENT

To find a regulatory taking one must generally either allege the loss of "economically viable use" of property or failure of a governmental entity to "substantially advance legitimate state interests," a test grounded in constitutional reason and Supreme Court precedent. When utilizing this test, a reviewing court looks squarely at the effect of the government action upon the property interest, not the stated or inferred governmental intent behind the action. The court below has chosen to skirt the required review of the impact upon the property owner, and instead give a mere cursory look to the governmental unit's 'intent' – finding that intent alone determines whether a regulatory taking has occurred.

By rewriting this Court's regulatory takings analysis, the lower court has removed from judicial consideration any review of a property owner's "distinct investment backed expectations," tossing such questions aside whenever it deems that the government intended no taking – regardless of the actual financial impact upon the property owner. This novel approach to takings jurisprudence effectively shields governments from potential liability for regulating Fifth Amendment property rights so long as they 'intended' to do something else.

REASONS FOR GRANTING THE WRIT

I.
BY FOCUSING ON THE INTENT BEHIND A GOVERNMENTAL ACTION RATHER THAN ITS EFFECT ON PRIVATE PROPERTY RIGHTS, THE COURT BELOW REPLACED REGULATORY TAKINGS ANALYSIS WITH A DEEPLY FLAWED 'MENS REA' REVIEW NOT APPROPRIATE TO FIFTH AMENDMENT JURISPRUDENCE

That the effect of a governmental action should be the focus of a takings review, rather than the alleged or inferred intent of the governmental actor, is well established.

"[T]he Constitution measures a taking of property not by what a State says, or by what it intends, but by what it does." *Hughes v. Washington*, 389 U.S. 290, 298 (Stewart, J. concurring). This legal principle is also found in Justice Brennan's dissent in *San Diego Gas & Electric*,[1] and in a fully developed state in the Court's opinion in *First English*, which noted that "where the government's activities have already worked a taking of all use of property, no subsequent action by the government can relieve it of the duty to provide

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[1] *San Diego Gas & Electric Co. v. City of San Diego*, 450 U.S. 621, 652-53 (1981)(Brennan, J., dissenting) (but representing the substantive views of five members of the Court); *See also Yuba National Resources Inc., v. United States*, 821 F.2d 638 (Fed. Cir. 1987).

compensation." [2] State courts have also followed this path. "It is the effect of the state's action that triggers the Just Compensation Clause, not the intent of the government in taking the action which led to the deprivation of private property rights." *Zinn v. State*, 112 Wis.2d 417, 430 (1983).

Indeed, at least two members of the Connecticut Supreme Court also agree.

> If the state has destroyed the value of a person's property, no difference of constitutional magnitude inheres in the question of whether the state intended to do so. . . . [T]he mens rea of the state – assuming that it can be divined – has nothing to do with an individual's right to invoke the constitutional guarantee of just compensation for harms inflicted by the state.

Santini v. Connecticut Hazardous Waste Management Service, 251 Conn. 121, 149 (1999)(Berdon, J., dissenting).

Yet the rest of the Connecticut Court decided instead that the effect of a governmental action on private property rights – no matter how severe – simply does not factor into the judicial equation. Finding that the case involved but the siting of a storage facility for low-

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[2] *First English Evangelical Lutheran Church v. Los Angeles County*, 482 U.S. 304, 321 (1987).

level radioactive waste, the court below deemed the process "mere governmental planning" rather than a "fixed and irreversible decision" to seize property. *Santini* at 140. Since there was no 'intent' to actually take possession of the property, there could be no grounds for a takings claim, so the majority explained.

While the denial of compensation for turning the subject property into what one justice dubbed "Chernobyl Estates" is troubling, much more disconcerting is the exemption from takings review carved out by this decision for cases not found to involve the requisite level of governmental intent. It is not intent which the takings clause of the Fifth Amendment measures, but damage to private property rights.

As this court has noted:

> Almost from the inception of our regulatory takings doctrine, we have held that whether a regulation of property goes so far that "there must be . . . compensation to sustain the act ... depends upon the particular facts." (citations omitted). Consistent with this understanding, we have described determinations of liability in regulatory takings cases as " 'essentially ad hoc, factual inquiries,' " (citations omitted), requiring "complex factual assessments of the purposes

> and economic effects of government actions." (citation omitted).

City of Monterey v. Del Monte Dunes at Monterey, 526 U.S. 687, 720 (1999).

And as recently explained by the Court of Federal Claims:

> Our role . . is not to make policy choices about the best ratio of regulation to individual rights, but to answer the question whether the public must pay for its regulations . . . . If those regulations take property the Constitution gives a simple answer: yes it must. The Founders chose to provide for just compensation, and this court must determine whether the Takings Clause is triggered by the facts before us today.

Florida Rock Industries, Inc. v. United States, 45 Fed. Cl. 21, 24 (1999).

When a court crosses over into efforts to discern 'intent,' it moves to an entirely different analysis most often found in the criminal context. As noted in a dissent from the court below, "a particular state of mind is appropriate only when we are attempting to determine whether a transgressor was morally responsible for a harmful act. . . . The takings clause of the constitution is not a criminal sanction; the courts are not asked to find the state 'guilty' of a taking." *Santini* at 149.

Yet that is precisely the end result of the analysis adopted by the court below – a requirement that the government be found to have the appropriate *mens rea* (and a 'fixed and irreversible' intent at that) before a taking can be found.

To suggest that the *mens rea* takings test adopted by the court below will muddy this Court's existing takings jurisprudence is to speak lightly. The court below declared a series of takings cases – including *Dolan v. Tigard*[3] and *Lucas v. South Carolina Coastal Commission*[4] – inapplicable because none of them involved a government intent only on "mere planning," without any aim to take property.

Such a test is not merely misguided but incompatible with this Court's constitutional interpretations of the takings clause. Allowing it to stand uncorrected puts in jeopardy the existing right of property owners to effect-centered, fact-based hearings on takings claims.

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[3] 512 U.S. 374 (1994).
[4] 505 U.S. 1003 (1992).

II.
BY FAILING TO ANALYZE THE ECONOMIC IMPACT OF THE GOVERNMENTAL ACTION ON PROPERTY INTERESTS, THE COURT BELOW UTTERLY DISREGARDED THE OWNER'S "DISTINCT INVESTMENT-BACKED EXPECTATIONS"

In rejecting other precedents of this Court, the court below ignored what has become one of the central tenets of takings analysis.

"In engaging in these essentially ad hoc, factual inquiries, the Court's decisions have identified several factors that have particular significance. The economic impact of the regulation on the claimant and, particularly, the extent to which the regulation has interfered with distinct investment-backed expectations are, of course, relevant considerations." *Penn Central Transportation Co. v. New York City*, 438 U.S. 104, 124 (1978).

These standards of review are now commonly quoted in takings jurisprudence. "The *Penn Central* inquiry entails an analysis of the economic impact, effect on reasonable investment-backed expectations, and character of the government action. Using these factors, a partial regulatory taking may be found where a regulation results in a deprivation of 'a substantial part but not essentially all of the economic use or value of the property (citation omitted).'" *Florida Rock* at 31.

While certainly reaching different results, courts nationwide consistently recognize the centrality of this analysis. "The economic impact of the regulation, especially the degree of interference with investment-backed expectations, is of particular significance." *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419, 426 (1982)(Finding a taking); "[P]erhaps most importantly, what was the diminution in the investment-backed expectations of the landowner, if any, after passage of the regulation?" *Reahard v. Lee County*, 968 F.2d 1131, 1136 (11th Cir. 1992)(Remanded for application of *Penn Central* standards), *cert. denied*, 514 U.S. 1064 (1995); "Even if the governmental regulation has not entirely destroyed the property's value, a taking can occur if the regulation has a severe enough economic impact and the regulation interferes with distinct investment-backed expectations. . . . The reasonable investment-backed expectation of the claimant is critical to this analysis. . ." *Mayhew v. Town of Sunnyvale*, 964 SW2d 922, 937 (Texas 1998)(Finding no taking).[5]

Considering that the general remedy for a taking is compensation, it makes perfect sense for this Court and others throughout the nation to look to an owner's 'distinct investment-back expectations' in order to determine both the degree of damage and to set a proper level of reimbursement for that damage.

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[5] *See generally*, Washburn, *"Reasonable Investment-Backed Expectations" As A Factor In Defining Property Interest*, 49 Wash. U. J. Urb. & Contemp. L. 63 (1996).

Without a factual review of such financial expectations, how would one know that a taking existed, much less how to compensate an owner for their loss? By refusing to explore this question, the court below failed to properly explore the actual impact of the governmental action upon the owner's property rights.

"Although there is no right to recoup one's investment, the inability to do so weighs in [petitioner's] favor, since the regulation consequently places a greater burden on [petitioner.]" *Florida Rock* at 39. It is that consideration which petitioner here has been denied – consideration of the inability to recoup an investment due to governmental action. If this Court does not reaffirm that all courts must take into account 'distinct investment-backed expectations' when reviewing a takings claim, Petitioner, and others like him, face a bleak future before the bench. For if the courts will not take into account a property owner's 'distinct investment-backed expectations' when reviewing a takings claim, who will?

CONCLUSION

For the above reasons, the amicus respectfully requests that this Court grant the Petition for a Writ of Certiorari.

Respectfully submitted,

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April 28, 2000